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Nos. 09-1454, 09-1478

Supreme Court, U.S.
FILED
JAN 28 2011
OFFICE OF THE CLERK

In The Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

JAMES ALFORD,
Deschutes County Deputy Sheriff,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE PACIFIC JUSTICE INSTITUTE AND CPS WATCH LEGAL TEAM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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I. INTEREST OF *AMICI CURIAE*[1]

The *amici* here include The Pacific Justice Institute (PJI) and CPS Watch Legal Team (an outgrowth of CPS Watch, a national nonprofit organization that provides education, information and assistance to families involved with child welfare agencies). Established in 1997 in California, PJI is a nonprofit 501(c)(3) legal defense organization with several regional offices. PJI has helped defend the rights of hundreds of families from threats by county child protective service agencies. PJI routinely files briefs in cases involving defense of religious liberties and family rights. For example, PJI represented Sunland Christian School in *In re Jonathan L.*, 165 Cal. App. 4th 1074 (2008). In this landmark decision, the Court of Appeal reversed itself on rehearing, finding that home schooling is lawful in California. There, PJI participated in briefing and oral argument.

CPS Watch Legal Team consists of attorneys, paralegals, case managers, litigation support specialists, and advocates from various backgrounds, including civil rights, juvenile law, dependency, family law, and criminal law. The team assisted in all phases

[1] Pursuant to Supreme Court Rule 37.6, the parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

of the case in *Heartland Academy Church v. Waddle*, 335 F.3d 684 (8th Cir. 2008). The case arose from the unlawful removal of 115 of Heartland Academy's students by Lewis County (Missouri) officials in 2001. That removal led to the issuance of an injunction against Lewis County officials, which was upheld on appeal. The team has continued in their work, focusing on mass child removals and civil rights violations.

II. DISCUSSION OF *CAMRETA V. GREENE*

In *Greene*, the Ninth Circuit Court of Appeals considered whether a two-hour interview of a child by a caseworker and armed deputy sheriff on school grounds constituted an "unreasonable" seizure under the Fourth Amendment. At the time of the interview, no warrant, court order, or parental consent had been sought or obtained. The Court held the seizure of the child under these circumstances violated the Fourth Amendment.

III. SUMMARY OF ARGUMENT

Several Circuit Courts have found that Child Protective Services (CPS) Agents investigating child abuse are the functional equivalent of police officers conducting such investigations and should, therefore, be governed by the same Fourth Amendment standards. The Fourth Amendment preserves the "right of the people to be secure in their persons, houses . . . without limiting that right to one kind of government official," *Calabretta v. Floyd*, 189 F.3d 808, 813-814

(9th Cir. 1999). *Accord*: *Good v. Dauphin County Soc. Servs. For Children & Youth*, 891 F.2d 1087 1094-1095 (3rd Cir. 1989); *Roska v. Peterson*, 304 F.3d 982, 996 (10th Cir. 2002); *Tenenbaum v. Williams*, 193 F.3d 581, 604-605 (2d Cir. 1999); *Michael C. v. Gresbach*, 526 F.3d 1008, 1016 (7th Cir. 2008).

The juvenile dependency system in this country is dysfunctional. Even Justice Carlos Moreno of the California Supreme Court has noted that the system is in need of a major overhaul. See *A Call For Swift Change for Juvenile Dependency Courts*, by Karen De Sa' (February 14, 2008), MercuryNews.com, at http://www.mercurynews.com/dependency/ci_8258428?nclick_check=1.

The problem stems in part from CPS agents' lack of proper education, training, accountability, and oversight. Each of these problems is magnified by the secrecy endemic to juvenile court proceedings. The combination of these circumstances prevents the nation's public child welfare agencies from achieving their laudable goal – to protect children and, where possible, maintain the family.

CPS agents play a crucial role in protecting children, and with that role comes a duty to act in a responsible and ethical manner. An unwarranted intrusion upon a family may be as devastating to a child as any failure to act in a case of severe abuse. CPS agents have the power to protect children and families or destroy them. *Jonathan M. v. Superior Court*, 2010 WL 3367683 (Cal. App. 4 Dist.). Through

misuse of this power – whether intentional or negligent – social services agencies have become feared institutions in the minds of many Americans.

The Fourth and Fourteenth Amendments provide the only nationally enforceable check against the arbitrary exercise of the great power CPS agents wield. This compels adoption of a constitutional standard adequate to insure CPS agents and police officers carry out their mandate – to protect children and preserve families where possible – without denigrating the rights of those they are charged to protect.

In the absence of exigency, the laws of all states require the involvement of a neutral magistrate before children may be detained and removed from their parents' custody. Hence, there is no need to adopt the standard advocated by Petitioners when detaining children to interrogate them. Social service workers and police simply need to adhere to established constitutional principles of search and seizure. The Ninth Circuit's decision in this case properly balances the competing interests at stake. This Court should affirm that decision, if this Court reaches the merits.

ARGUMENT

IV. JUDICIAL REVIEW IS ESSENTIAL IN THE ABSENCE OF EMERGENCY OR PARENTAL CONSENT

Virtually all states have provisions whereby CPS agents and police officers investigating suspected

child abuse may obtain a court order to interview or detain a suspected child victim.[2]

Experience demonstrates that when CPS agents and police or sheriffs investigating alleged child abuse bypass judicial review, violations of the constitutional rights of children and parents often occur.

The Beck Family

In October 1988, CPS agents at Westchester County New York's Department of Social Services received an anonymous report claiming that three teenage girls were being beaten by their parents with

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[2] Laws in each of the following twenty five states permit the agency investigating child abuse to seek a court order showing good cause before removing or interviewing a child: **Alabama** – Ala. Code § 26-14-7(c); **Arizona** – Ariz. Rev. Stat. § 8-803(D); **Arkansas** – Ark. Code Ann. § 12-12-510(b); **California** – Welfare & Institutions Code § 340; **Colorado** – Colo. Rev. Stat. § 19-3-308(3)(b); **Delaware** – 16 Del. Code Ann. § 910(b)(1) and (2); **Florida** – Fla. Stat. Ann. § 39.301(13); **Illinois** – 325 Ill. Comp. Stat. 5/7.5; **Iowa** – Iowa Code Ann. § 232.71B(6); **Kentucky** – Ky. Rev. Stat. Ann. § 620.040(5); **Louisiana** – La. Child. Code § 613(A); **Maryland** – Md. Code Ann., Fam. Law § 5-712(b); **Massachusetts** – Mass. Reg. Code 110 § 4.27.3; **Michigan** – Mich. R. Ct. 3.963(B)(1); **Minnesota** – Minn. Stat. § 626.556(10)(c); **Mississippi** – Code of Miss. Rules 11-111-001(2046); **New Hampshire** – N.H. Rev. Stat. Ann. § 169-C: 38 IV; **New York** – Soc. Serv. Law § 424; N.Y. Fam. Ct. Act § 1022; **North Carolina** – Gen. Stat. § 7B-303(a-b); **Ohio** – Ohio Rev. Code Ann. § 2151.31; **Oklahoma** – Okla. Stat. tit. 10 § 7106.C.2; **Oregon** – Or. Rev. Stat. § 419B.150; **South Carolina** – S.C. Code. Ann. § 63-7-920(b); **Utah** – Utah Code Ann. § 78A-106(1); **Wisconsin** – Wis. Stat. Ann. § 48.981(3)(c)(1)(b); **Wyoming** – Wyo. Stat. Ann. § 14-3-405.

belts and paddles at an address in Scarsdale. The caller claimed that the victims were three *girls*. The police determined the Becks did not have three girls. Despite these facts CPS agent Evelyn Hester went first to the home of Jennifer Beck, then sixteen, and her brother David, then thirteen. No one was home. The CPS agent then went to the children's school.

Without a warrant and without even notifying the children's parents, the CPS agent interrogated Jennifer and David and forced them to undress as she peered into their underpants while other people looked on. See William Glaberson, *Family Nightmare: A False Report of Child Abuse*, New York Times, December 4th, 1990, at http://www.nytimes.com/1990/12/04/nyregion/family-nightmare-a-false-report-of-child-abuse.html.

The Bucholz Family

Dawn Bucholz was five years old and developmentally delayed. In March 1999 her school principal called Tulare County (California) Child Protective Services. The principal reported that Dawn complained of pain in her vaginal area.[3] CPS agents Kristen Smith and Arlene Nunez, accompanied by a Tulare County sheriff, went to Dawn's school.

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[3] All page and line references are to the deposition of Terri Rufert, taken on March 22, 2001 in *Bucholz v. County of Tulare et al.*, Tulare County Superior Court case No. 00-0190263, attached hereto as Appendix A. This material has been lodged with the clerk and provided to petitioner's counsel.

The principal told the sheriff and social workers that Dawn had difficulty describing things and expressing herself, and that she tended to get fixated. The principal wanted to call Dawn's parents, but the sheriff refused to let her. (21:22-22:9) The CPS agents ordered the school principal to restrain Dawn. One of the workers then inserted her ungloved finger into the resisting child's vagina to do what was termed an "examination." (113:12-114:20; 160:13-19)

It turned out that the swelling in Dawn's vaginal area was caused by the topical application of medicine.

The McMartin Family, Dale Akiki

In his dissent in *People of the Territory of Guam v. McGravey*, 14 F.3d 1344 (9th Cir. 1994), Justice Reinhardt cited the *McMartin* and *Akiki* cases as examples of the pernicious effect of leading and suggestive interviews of minor witnesses in cases of alleged child abuse:

> It is difficult to understand the majority's argument in light of recent well-publicized cases where sensational charges, later proved to be false, were made by children after they were interviewed by therapists who employed aggressive and leading questions. In the McMartin case . . . [the] owners of the McMartin pre-school in Manhattan Beach, CA, were charged with multiple counts of rape and sodomy, acts which the children alleged took place over many months and were accompanied by the slaughtering

> of animals and elaborate satanic rituals. . . . Despite wide and arguably prejudicial pre-trial publicity, both defendants were acquitted by a jury on 52 counts of child molestation. . . .
>
> In the Akiki case . . . another pre-school teacher, Dale Akiki, was acquitted by a jury on all counts but only after spending more than two years in jail awaiting trial. Allegations in this case, again made after interviews with a large number of children, included the ritual slaying inside the pre-school of a giraffe and an elephant. . . .

Id.

The Wallis Family

In 1991, San Diego County (California) CPS agents and City of Escondido Police Officers interviewed and detained a three-year-old boy and his five-year-old sister based on a report they received from a woman who had spent most of her adult life in mental institutions, and was going through repressed memory therapy. The woman told the agents that her brother-in-law, Bill Wallis, was going to sacrifice his son, Jesse, to the Devil. *Wallis v. Spencer*, 202 F.3d 1126 at 1131 (9th Cir. 2000). Without obtaining a court order and without any exigency whatsoever, the CPS agents and police officers removed both Lauren and Jesse from their parents. Then, without court order or medical need, agents performed a series of highly intrusive medical examinations, including internal vaginal and anal exams.

As the *Wallis* court noted "[a]t the time Lauren and Jessie were removed, the police department had received a report from a mental health worker that an institutionalized mental patient, who had an extensive history of severe delusional disorders and multiple personalities, had told a story of anticipated ritual murder by Jessie's father – a story that would appear to an objective observer clearly to be founded in mental illness. In fact, Detective Claytor later testified that the allegations "sounded a little bizarre" to him, and that he had expressed that opinion to Detective Pitcher at the time. Applying a reasonable cause standard, the juvenile court judge who subsequently heard the dependency petition in this case explicitly rejected those charges as a basis for removing Lauren and Jessie from their parents' custody." *Id.* at 1138-1139.

The N. Family

On January 15, 2011, the Washington Post carried a story concerning the removal of a nine-year-old boy and five-year-old girl from their parents after police seized photographs taken by the children themselves posing nude. Although the district attorney declined to prosecute the parents for this child play, CPS agents have nevertheless proceeded with a juvenile dependency case against them.

Months after the removal, the five year old made an ambiguous statement that her father had touched her without revealing sufficient detail to exclude the possibility that the touching was innocent. The

parents are Serbian nationals and the case has caused outrage in Serbia and pressure on the United States government to return the children immediately. A trial is scheduled in February, 2011. See Jason Dearen, *California Custody Battle Sparks Overseas Outrage*, (January 15, 2011) WashingtonPost.com, at http://www.washingtonpost.com/wp-dyn/content/article/2011/01/15/AR2011011501848.html.

In each of these cases, the investigating CPS agents or law enforcement personnel undertook the offensive conduct *without* requesting a warrant from a neutral magistrate. Moreover, and equally as important, there was no exigency shown in any of these cases.

These cases, like the case at bar, illustrate why review by a neutral magistrate is essential to protect children and their parents from the vagaries of warrantless interrogation of children and subsequent removal to foster care. Allowing CPS agents and policemen to interview children at school in the absence of exigency, parental consent, or a warrant as Petitioners urge, will undoubtedly lead to many more abuses of families such as those documented above.

V. CPS AGENTS ARE THE FUNCTIONAL EQUIVALENT OF POLICE OFFICERS AND SHOULD BE REQUIRED TO OBSERVE THE SAME CONSTITUTIONAL STANDARDS AS POLICE OFFICERS

In the dependency context, CPS agents are the functional equivalent of police officers, since both have

the power to investigate abuse and remove children from their homes. Or. Rev. Stat. § 419B.007, California Welfare & Institutions Code §§ 300-396.

The federal scheme of funding the states' child abuse prevention efforts mandates that CPS agents and policemen jointly investigate allegations of child abuse. With the passage of the Child Abuse Prevention and Treatment Act (Pub. L. No. 93-247, § Stat. 4 (Jan. 31, 1974) (CAPTA)), the federal government has acted to improve child abuse prevention efforts, and Congress codified this preference for multi-disciplinary teams in CAPTA by "creating and improving the use of multidisciplinary teams and inter-agency protocols to enhance investigations." 42 U.S.C. § 5106a(a)(2)(A). To be eligible for a grant under CAPTA, a state must submit a plan that includes an assurance that it has a child abuse program in place that requires "the cooperation of state law enforcement officials, courts of competent jurisdiction, and appropriate state agencies providing human services in the investigation, assessment, prosecution, and treatment of child abuse or neglect." 42 U.S.C. § 5106a(b)(2)(A)(xi). Perhaps in recognition of the lack of professional qualifications and training of CPS agents (see *infra* section VII), most states require multi-disciplinary investigations.[4]

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[4] **Alabama** – Ala. Code §§ 26-16-13, -50; **Alaska** – Alaska Stat. §§ 47.14.300(a), .17.033(j); **California** – Cal. Penal Code § 11166(a), (j), (k); 12; **Colorado** – Colo. Code Regs. § 2509-3:7.202.51(A); Colo. Rev. Stat. § 19-3-308(4); **Delaware** – Del.

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This joining of forces, required by CAPTA, between CPS agents and police creates doctrinal confusion under the Fourth Amendment because of the mixed motives of the government officials participating in the investigation. This court made reference to this problem in another context in *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985), where it distinguished criminal investigations from those conducted to assure school safety and noted that reasonable suspicion was the appropriate standard in the latter instance.

But child interrogations during child abuse investigations do not implicate a governmental interest in assuring safety at school. Rather they touch on fundamental rights of parents and children to be free from governmental action which interferes with familial association. Since the interests are so different from those identified in *T.L.O.*, a different standard is called for. That standard should require submission of a warrant application to a neutral magistrate in the absence of parental consent or exigency.

Code Ann. tit. 16, § 906(b)(15); **Hawaii** – Haw. Rev. Stat. § 588-10(b)(5); **Idaho** – Idaho Code Ann. § 16-1617; Idaho Admin. Code 16.06.01.570; **Illinois** – Ill. Comp. Stat. Ann. 5/7.1(a), 5/7.3; **Kentucky** – Ky. Rev. Stat. Ann. § 620.040(7); **Missouri** – Mo. Ann. Stat. § 210.145(10); **New York** – N.Y. Soc. Serv. Law §§ 423(6), 424(5-a); **North Dakota** – N.D. Cent. Code §§ 50-25.1-05(2), -12; **Oregon** – Or. Rev. Stat. § 419B.020(2)(a); **South Carolina** – S.C. Code Ann. § 63-7-980; **Tennessee** – Tenn. Code Ann. §§ 37-1-607, -611(a)(3); **Utah** – Utah Code Ann. § 62A-4a-202.3(8); **Washington** – Wash. Rev. Code Ann. § 26.44.180(2); **Wisconsin** – Wis. Stat. Ann. § 48.981(3)(a)(4).

At present, such a requirement imposes only the slightest burden given the ready availability of magistrates in every jurisdiction at all times of day or night and the ability to obtain warrants by telephone or fax. For example, since the passage of Utah Stat. Ann. § 78A-6-106 in 2002, Mary Noonan, the chief of the Child Protection Division of the Attorney General noted that, "as attorneys have become accustomed to seeking removals, they have cut the average time needed [to obtain warrants] from five hours to about two." Associated Press State & Local wire, "DCFS, Meeting Legislative Mandates Harder than Expected," July 2, 2003. See Appendix B.

VI. EXIGENCY IS AN ADEQUATE EXCEPTION TO WARRANT REQUIREMENTS

This Court has long recognized that exigent circumstances will justify warrantless searches and seizures. Exigent circumstances have been defined as circumstances where "there is compelling need for official action and no time to secure a warrant." *Michigan v. Tyler*, 436 U.S. 499, 509 (1978). This Court has also held that "[T]he most basic constitutional rule" in the search and seizure area is that exceptions to the warrant requirement must be "specifically established," "well delineated," and "jealously and carefully drawn." *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455 (1971).

Neither Petitioners nor their *amici* discuss this powerful law enforcement tool anywhere in their

briefs. Nor is there any argument that exigency supported the conduct of the officers and social workers in this case – it did not. Quite obviously, had a true emergency situation existed, enforcement agents would have had the right to interrogate and detain S.G.

For instance, had S.G. complained to her teacher, or other school official, that she was being abused; had she come to school with unexplained bruising or other injuries; or even if someone had called the authorities and stated that S.G. was about to be abused when she returned home; it would not only have been appropriate, but mandatory that she be questioned and, if justified, detained.

That is not what happened here. No complaint was ever made by S.G., her teachers, or any of the mandated reporters at her school. No doctor or other health care professional ever told the authorities that they suspected abuse. In fact, S.G. was a special education student who had an I.E.P.[5] and was more closely monitored as a result.

One could surmise the *only reason* these agents went to the school to interrogate this little girl was

[5] IEP stands for Individualized Educational Program, mandated by the Individuals With Disabilities Educational Act for children like S.G. 20 U.S.C. §§ 1414(a),(b),(c). It is designed to help teachers and school administrators understand a child's disability and how the disability affects the learning process. There is no evidence in the record that either Camreta or Alford inquired about or understood S.G.'s disability.

that they were trying to skirt the constitutional warrant requirement, a requirement they knew existed to protect families from intrusion into their homes. This has become a widespread practice among police and CPS agents. As one California official admitted, "usually kids are interviewed without the parent even knowing it. Very rarely does CPS actually go to the home, so we just don't need" [to worry about parental noncompliance and obtaining a warrant to search the family home]. Doriane L. Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 William and Mary Law Review, 413 at 438 (2005).

The circumstances of S.G.'s interrogation demonstrate why a warrant should be required. According to an evaluation done of S.G. at Elk Meadow School, her cognitive ability and her comprehension were below normal. School evaluators told her mother that she processed things very differently and was slow to respond or understand. J.A.[6] 42. Moreover, S.G. testified that during the interrogation by Camreta and Alford she "was scared, had a stomach ache and did not feel good." J.A. 54. Despite S.G.'s condition, Camreta kept at her for two hours, J.A. 55, refusing to accept her denials of having been abused. J.A. 71. Finally, S.G. testified that she did not know what Camreta was talking about when he inquired about "sexual abuse," J.A. 56. In the end, predictably, S.G.

[6] J.A. refers to the Joint Appendix.

simply and finally told her interrogators "what she thought they wanted to hear." J.A. 57.

On the facts of this case, there was no exigency to justify the conduct of these officers. Had there been, the CPS agent and the police officer would not have waited more than four days to intervene in the case after they knew S.G.'s father was back in the home. Nor would they have sent S.G. home to live with her – allegedly abusive – father for more than a week before she was removed.

VII. NO REMEDY EXISTS IN THE JUVENILE COURTS FOR ABUSE OF CONSTITUTIONAL RIGHTS

Juvenile court systems are designed to protect children from abuse or neglect rather than vindicate constitutional rights. Therefore, it is necessary that this court direct that judicial oversight, exigency, or parental consent operate as constraints against such abuses.

Parents and children whose rights have been violated by an improper in-school seizure have no remedy in the juvenile courts. Thus, strict adherence to Fourth Amendment warrant requirements is even more critical than in other instances. This Court has recognized that, except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant. *Camara v. Municipal Court*, 387 U.S. 523, 528-529 (1967).

For example, there is no suppression of evidence in a juvenile court no matter how egregious the Fourth Amendment violation may be. As the California Fourth District Court of Appeal noted in *In re Mary S.*, 186 Cal. App. 3d 414 (1986):

> Dependency proceedings are civil in nature, designed not to prosecute a parent, but to protect the child. [Citations.] A parent at a dependency hearing cannot assert the Fourth Amendment exclusionary rule, since 'the potential harm to children in allowing them to remain in an unhealthy environment outweighs any deterrent effect which would result from suppressing evidence' unlawfully seized. [Citations.]

186 Cal. App. 3d at 418-419, fn. omitted

The juvenile court itself does not review the manner by which evidence is obtained once the child is in the system. Particularly pertinent to this discussion is the case of *People United for Children, Inc. v. City of New York*, 108 F. Supp. 2d 275 (S.D.N.Y. 2000), where the plaintiffs challenged a system-wide policy of resolving any ambiguity in an abuse investigation in favor of finding that abuse had occurred. The court ruled that the issues raised in the parents' current challenge had not been actually and necessarily decided in prior proceedings. "Although the Family Court addressed the removal in plaintiffs' individual cases, it did not consider the broader claims asserted here, which relate to the system-wide policies and practices of ACS." *Id.* at 287.

The court also found that plaintiffs did not have a full and fair opportunity to litigate their current claims in the Family Court. "New York courts recognize that parents' rights are subordinate to the purpose of child protective proceedings, which is to protect the child from abuse or neglect" [citations omitted]. *Id.* The court also noted that in Family Court the parents are principally concerned with regaining custody of their children and have little incentive to raise or litigate constitutional claims especially where doing so may disrupt or prolong the proceedings. *Id.* at 287-288.

While a family may later seek to redress constitutional violations in an action under 42 U.S.C. § 1983 action, this is a far less efficient mechanism than preventing a violation by adhering to federal standards where they require a warrant in the first instance.

VIII. THE VAST MAJORITY OF CPS AGENTS LACK THE EDUCATION AND TRAINING REQUIRED TO QUALIFY AS A "PROFESSIONAL"

As stated earlier, CPS agents in general are not professionals. The word "professional" implies a certain level of expertise, education, and training that is

lacking in those who generally work for CPS.[7] Nor is training just a technical matter. It is designed to influence attitudes and to curb abuses of power. Effective training should engender sufficient "professionalism" to overcome even momentary impulses toward retribution or other unsavory actions.

Unfortunately, training provided to CPS workers leaves much to be desired. Their lack of sufficient education and training, both in their field generally and with regard to the constitutional rights of children and parents in particular, has a devastating impact on families who come into contact with CPS, as can be seen from the several cases described above.

In those cases and many others across the country, where parents have been wrongly accused of mistreatment of their children, this lack of professional training has led to children being illegally seized, physically and mentally injured, and families being traumatized and destroyed.

According to national data from the Child Welfare League of America, investigative caseworkers' qualifications fall into the following categories:

1. No degree: 5 percent
2. Bachelor's degree, any field: 26 percent

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[7] Merriam Webster's Online Dictionary defines "professional" as "Characterized by or conforming to the technical or ethical standards of a profession."

3. Bachelor's degree, related field: 45 percent
4. Bachelor of Social Work: 14 percent
5. Master of Social Work: 2 percent
6. Other: 7 percent

In some states, caseworkers are required to have additional training, anywhere *from one day to several days' worth*! See National Public Radio investigative report, *Failure to Protect*, at http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/inside/welfarefaq.html.

This means that 84% of caseworkers who work for CPS have no education, background, or training to work in a field that allows them to make momentous decisions about whether children should be removed from their parents' care, custody and control. According to executives of the National Association of Social Workers, in some states, these caseworkers are not allowed to refer to themselves as "social workers." See Appendix C. "Case and Social Worker Not the Same," Syracuse Post-Standard, Oct. 13, 2008 author Mark Buttiglieri; Appendix D. The Philadelphia Inquirer, Nov. 16, 2008, author Jenna Mehnert.

Contrast this with the education and training of public school teachers. Ninety seven percent (97%) of teachers nationwide are designated as "highly qualified." U.S. Dept. of Education, "A Summary of Highly Qualified Teacher Data," May 2008, at www2.ed.gov/programs/teacherqual/briefing-on-2006-07-hqt-data.doc. Generally, this means that teachers have a four-year college education, specialized training, and are certified in the subject that they are teaching. See

Title IX, Section 9101, at http://ritter.tea.state.tx.us/nclb/hottopics/hqdef.html.

Similarly, most police officers in major cities are now required to have a two-year or four-year college degree. Police Association for College Education, *Information Paper*, March 18, 2004, at http://www.police-association.org/library/articles/information_paper.html. Moreover, police training is comprehensive (up to twenty five weeks) and includes study of constitutional principles, including search and seizure law. In addition, officer candidates undergo psychological evaluations, both before hiring and during training. See San Diego Police Dept. hiring requirements, at http://www.sandiego.gov/police/recruiting/join/index.shtml.

By comparison to police officers, CPS agents are undereducated, undertrained, and poorly versed in constitutional principles. Moreover, they are charged with weighty responsibilities for which they are not adequately equipped.

IX. THE PERNICIOUS EFFECT OF SECRECY IN THE JUVENILE COURT SYSTEM

Thirty four states cloak their Juvenile Court proceedings in secrecy. "Civil Liberties Without Exception," August 2008, at http://www.nccpr.org/reports/dueprocess.pdf. Neither the press nor individuals other than parties are permitted to observe the proceedings. All documents related to the proceedings are confidential. Access to documents is strictly

controlled and almost never available to the public See Or. Rev. Stat. § 419A.255; California Welfare & Institutions Code § 827.

Parties are routinely prohibited from speaking to others about the proceedings. This includes the press. See *Mother Jailed, Put on Trial for Curing her Son of Melanoma*, Angry Scientist, October 3, 2007, at http://angryscientist.wordpress.com/2007/10/03/mother-jailed-put-on-trial-for-curing-her-son-of-melanoma. Rather than protecting the privacy of the parties, this secrecy is more often used to hide the misfeasance or malfeasance of child welfare agencies.

The juvenile court system not only operates in the dark but gives short shrift to the cases it handles. It is a system driven by the clock. There is little time for deliberation. Appointed lawyers pay scant attention to their clients, often meeting with them only on hearing days and just before critical decisions will be made in their cases. See http://www.mercurynews.com/dependency/ci_8258428?nclick_check=1. These flaws are not limited to those described by Justice Moreno and include the routine use of substitute counsel and failure to advocate by attorneys. See American Bar Association Center on Children and the Law (2009), *Legal Representation for Parents in Child Welfare Proceedings: A Performance-Based Analysis of Michigan Practice*, at http://new.abanet.org/child/PublicDocuments/michigan_parent_representation_report.pdf, at pages 4-7.

As Martin Guggenheim, Fiorello LaGuardia Professor of Clinical Law at New York University School of Law, observed:

> This is not a system of law that operates like most others, in which there is an understanding that an independent fact finder, the judge, is to play the prominent role in what happens. Instead, child welfare is seen mostly as case management, and the expert is not the judge but the case supervisor. So judges tend to give great deference to what is recommended. And in most jurisdictions, what the agency seeks, it gets.

National Public Radio, *Failure to Protect*, interview with Martin Guggenheim, at http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/inside/guggenheim.html.

This Court has recognized the disparity between the parties at the termination of reunification stage of the proceedings:[8]

> The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys

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[8] At the time of *Santosky v. Kramer*, 455 U.S. 745 (1982), termination of parental rights was litigated in family courts. Today, they are litigated in juvenile courts.

> full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers, whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.

Santosky at 763.

Respected juvenile court jurists believe the effect of secrecy in these courts is to protect the agencies themselves, rather than children. The Honorable Michael Nash, presiding judge of the Los Angeles County Juvenile Court – one of the largest in the nation – opined that "the main entity that's protected by closing these proceedings is the system itself." See Opinion, *An Open and Shut Case*, Los Angeles Times, December 19, 2010, at http://articles.latimes.com/2010/dec/19/opinion/la-ed-dcfs-20101219.

Nowhere is the negative impact of this opaque shield of secrecy more apparent than in the statistics presented by Petitioners and their *amici* when they suggest the scope of the child abuse problem is "staggering" (Alford Br. at 36) or an "epidemic." Camreta Br. at 24; Br. of National Ass'n of Social Workers and The Oregon Chapter of National Ass'n Of Social Workers at 4.

Petitioners, and virtually all of the *amici* briefs submitted in their support, stress the "huge" threat child abuse poses to society. They urge and attempt to justify the broad expansion of powers based on that perceived threat. Alford Br. at 28-29, 36; Camreta Br. at 11, 24. Statistics reveal, however, that the sky – in fact – is not falling. The "threat of abuse" trumpeted by Petitioners remains unrealized in the vast majority of cases.

Child Maltreatment 2009 presents national data about child abuse and neglect known to CPS agencies in the United States during federal fiscal year 2009. The data were collected and analyzed through the National Child Abuse and Neglect Data System (NCANDS), which is the twentieth of such reports. That data demonstrate that the rate of "substantiated" child abuse is the lowest it has been in nineteen years. See http://www.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf. For the 2004 data, see http://www.acf.hhs.gov/programs/cb/pubs/cm04).

In addition, a recent report analyzing the data presented in *Child Maltreatment 2009* reveals that the rate of sexual abuse per 10,000 persons under age 18 has *declined* 61% and the rate of physical abuse per 10,000 persons under age 18 has *decreased* 55%. The report also notes that the overall rate of substantiated child abuse "is the lowest level of child maltreatment since the NCANDS system was put in place in 1990."

Petitioners' suggestion that child abuse is a growing phenomenon is not supported by their own data. The statistics show substantiated instances of "child abuse" have decreased over the last 19 years, not increased. See Finkelhor, Jones, and Shattuck, *Updated Trends in Child Maltreatment 2009*, University of New Hampshire, at http://www.unh.edu/ccrc/pdf/Updated_Trends_in_Child_Maltreatment_2009.pdf.

Perhaps more importantly, the definition of what constitutes "abuse" is incomprehensibly vague and subjective. Those who argue for expansive government powers at the expense of familial rights skew their statistics by including instances of "neglect" under the penumbra of "abuse." "Neglect," constitutes 78.3% of all reported "abuse." See U.S. Department of Health & Human Services, *Child Maltreatment 2009*, at http://www.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf, Figure 3-4, page 23. This "neglect" – also loosely defined – can range anywhere from leaving a child unattended in a fenced playground for 5 minutes, to instances where the parents have gone on 2 day drinking binges. Lyons, Brendan J., *A 5-minute Error, 25 Years on Child Abuse List?* (May 23, 2010) Timesunion.com, at http://albarchive.merlinone.net/mweb/wmsql.wm.request?oneimage&imageid=10696111.

The data on which Petitioners rely are collected from databases maintained in each state to identify persons who are suspected of abuse or neglect. In cases where "sexual abuse" is "substantiated," as in others, the data are misleading. The obvious implication of a "substantiated" finding is that a court has adjudicated

the matter. Such an assumption would be incorrect. By statute, a "substantiated" finding is permitted based on conclusions reached by either a social worker, police officer, or other governmental agent without trial or any other judicial determination. Even when a Court has found there was no abuse, the government refuses to clear the accused of wrongdoing. *Los Angeles County v. Humphries*, Nov. 30, 2010 [2010 WL 4823681].

X. OTHER SYSTEMIC ISSUES ILLUSTRATE THE NEED FOR A CHECK ON THE POWER OF CPS AGENTS

Petitioners suggest that to protect children from potential abuse CPS agents and police must be armed with powers even broader than those under existing statutory frameworks. Camreta Br. at 11, 14; Alford Br. at 11, 36. The necessity for such broad powers is belied by the circumstances of this case, i.e. the utter lack of probable cause or exigency. Seizures and interrogations of children under circumstances that are themselves intimidating and traumatic are a form of abuse.

Petitioners espouse the notion that governmental power supersedes parental authority because *some* parents *may* refuse to allow their children to be interrogated based on *any* allegation of abuse or neglect. This "notion" is repugnant to American traditions. This Court has long held that there exists a "private

realm of family life which the state cannot enter." *Prince v. Massachusetts*, 312 U.S. 158, at 166 (1944).

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); and "[r]ights far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953).

The government's vital interest in preventing child abuse does not require sacrifice of Fourth Amendment protections. The argument which Petitioners make here has been made before and rejected by this Court. For example, in *Mincey v. Arizona*, 437 U.S. 385, 393 (1978), this Court rejected a proposed exception to the Fourth Amendment for warrantless searches at homicide scenes. The Court aptly noted that there would be no rational limitation to such a doctrine given any number of vital interests the government could assert to justify such an exception. In *Mincey*, *supra* at 393, quoting *Chimel v. California*, 395 U.S. 752, 766 (1969), the Court stated

> The State points to the vital public interest in the prompt investigation of the extremely serious crime of murder. No one can doubt the importance of this goal. But the public interest in the investigation of other serious crimes is comparable. If the warrantless search of a homicide scene is reasonable, why not the warrantless search of the scene of a

> rape, a robbery, or a burglary? "No consideration relevant to the Fourth Amendment suggests any point of rational limitation" of such a doctrine.

Child abuse – where it does occur – poses a serious threat. But, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." *Indianapolis v. Edmond*, 531 U.S. 32 at 42-43 (2000). The Fourth Amendment's general prohibition against non-consensual warrantless searches, and searches where there is no probable cause necessarily applies to interrogations such as the one at issue here. See, e.g., *Chandler v. Miller*, 520 U.S. 305 at 308 (1997); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 at 619 (1989); *Ferguson et al. v. City of Charleston*, 532 U.S. 67 at 86 (2001). While it would serve the interests of expediency and efficiency to abrogate warrant requirements, it simply cannot be said that the rights of innocent families and children must give way to expediency. As this Court so eloquently stated, "When the right of privacy must reasonably yield to right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Johnson v. United States*, 333 U.S. 10 at 14 (1948).

XI. MONEY CREATES A PERVERSE INCENTIVE IN THE JUVENILE SYSTEM

Due to enormous federal matching grants to support the foster care system, CPS agents are

encouraged to find abuse or neglect wherever they look. Since the funding is tied to the removal and adoption of children, little effort is made to keep children at home with services to the parents. The longer children remain out of home, the more money CPS agencies receive. This funding under Title IV-E of the Social Security Act has spawned a huge child abuse industry.

The budget of Los Angeles County's Department of Children and Family Services for 2009, alone, was $1.8 billion. That agency has a staff of more than 7,000. A decade ago 3,000 workers managed about 50,000 foster children. Since then, the number of CPS agents has *increased* to about 3,900, while the number of children in the system has *declined* to about 32,000. See Author Unknown, *To Protect the Children*, Los Angeles Times, November 21, 2010, at http://articles.latimes.com/2010/nov/21/opinion/la-ed-dcfs-20101121.

These tremendous financial incentives have perverted the goal of the juvenile court system – to protect children. "What you have now is an incentive to initially remove the child and an incentive to adopt them out," said David Sanders, former head of the Los Angeles County Department of Children and Family Services, one of the nation's largest child welfare systems. "I think when you put these two together, there is a problem." Troy Anderson, *Government Bonuses Accelerate Adoptions*, Daily News of Los Angeles, December 8, 2003, at http//www.thefreelibrary.com/GOVERNMENT+BONUSES+ACCELERATE=ADOPTIONS.-A0111075310.

Petitioners suggest that with dwindling budgets they need greater discretion to make efficient use of their more limited resources. Br. of Attorneys General at p. 11. But constitutional proscriptions against the exercise of government power should not be sacrificed in the interest of expediency or efficiency. As pressure mounts to justify the immensity of "child protection" budgets, the necessity of greater judicial oversight becomes paramount.

This need is illustrated by states such as Kentucky, where the State earns federal bonuses for keeping adoption numbers high, and where an NBC computer analysis showed that adoptions have tripled in six years, and the number of children returned to their homes has dropped sharply. See Lea Thompson, *Increasing Adoptions: A Good Idea Gone Wrong?*, MSNBC, at http://www.msnbc.msn.com/id/13304867/.

Nowhere is this pressure better illustrated than in the recent decision of the California Fourth District Court of Appeal in *Jonathan M. v. Superior Court*, *supra*. There, the Court issued a writ of mandate, finding that the juvenile court had abused its discretion when it reduced the petitioner father's visitation with his children simply because he had had sexual relations with the mother when she was 16 years old and he was less than two years older than she was. *Id.* at 7.

Noting that the allegation was groundless, the court stated:

> This kind of pleading undermines confidence in the system. It damages the reputation of

> the Social Services Agency and causes parents to suspect the system is prejudiced against them, and social workers will use any excuse they can think of -- whether credible or not – to deprive them of the custody of their children. *It has to stop*.

[Emphasis in original.]

XII. CONCLUSION

Petitioners call for a radical new "doctrine" which would vest broad quasi-judicial powers in CPS agents. This doctrine would give them *carte blanche* to intrude into family life on the flimsiest of pretexts. The Petitioners' and their *amici*'s claimed justification for these powers finds no support in law, and is antithetical to the American tradition of limited and accountable government.

In the juvenile dependency system – a system that operates largely under a shroud of secrecy – the neutral magistrate stands as a buffer designed by the architects of our constitutional system to prevent abuses. The importance of this buffer against arbitrary governmental intrusions cannot be overstated.

To remove this buffer, as Petitioners urge, would only serve to further undermine public confidence in a system already assailed as dysfunctional. It is the function of the neutral magistrate, not the CPS agent, to determine what constitutes probable cause as required by the Fourth Amendment. The well-reasoned and deliberate decision of the Ninth Circuit

should be affirmed in its entirety, if the Court reaches the merits.

Dated: January 28, 2011

Respectfully submitted,

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APPENDIX A

Bucholz v. Tulare County. Superior Court – California. Case No. 00-0190263

Deposition of Terri Ruffert, Dated March 22, 2001

Page 13:1-16

Q: And do you know what prompted their visit?

A: Yes. I'm the one that called CPS.

Q: Okay.

A: Dawn was complaining of pain in her lower area and the teacher brought her in – she was kind of difficult to understand – brought her in and I asked her questions based on what the teacher had said. The teacher said she kept pointing and saying it hurt and saying that daddy did it. So I questioned her. I tried to question her in a lot of different ways, and all she responded is she would point and respond that daddy did it, and so at that time with my responsibility, I had to call CPS, so I called them out at that time.

Page 21:22-26, Page 22:1-9

Q: Okay. When you talked to the officer when the social workers weren't present, what did that conversation consist of?

A: Basically I explained what happened like I've stated before and I also explained that I was a little uncomfortable with the referral because of the child's difficulty with receptive and expressive skills and the fact that she gets fixated on

something. And I believe I asked at the time – at that time if I could call the parents.

Q: And did he respond to that?

A: He told me no.

Page 113:12-26, Page 114:1-20

Q: Do you know if she touched her vaginal area with her hands?

A: I did not see her touch that.

Q: That's not the question.

A: I heard her talk to – I overheard a conversation with her and Arlene. And I didn't pick up the whole conversation, but my interpretation was that she did, but I didn't see it.

Q: Did what?

A: And I only heard part. Used her fingers.

Q: Used her fingers where?

A: To kind of spread to show Arlene.

Q: The labia?

A: Uh-huh. She didn't say that. She just –

Q: Tell me what she said. You can use the vernacular if you need to.

A: Okay. She was talking. It was when they were outside when I said they were outside the room kind of talking, and I really couldn't hear what they said, I just overheard a few things. And the only things I can remember, and I can't remember exactly, was – actually, it was after Kristen

made a phone call. And then I heard her say something about, "Did you see that? Did you see that when I pushed it to the side," and that's all I heard. I assumed that meant that she had her fingers somewhere or her hands or something.

Q: Somewhere where?

A: In the girl's private area or on her legs or something like that because of her comments that she's been violated.

Page 160:13-19

Q: Did Kristen go over and wash her hands before she examined the little girl?

A: No.

Q: Didn't use gloves?

A: No.

Q: And they were available?

A: Yes.

APPENDIX B

HEADLINE: DCFS: Meeting legislative mandates harder that expected

DATELINE: SALT LAKE CITY

BODY:

Meeting new mandates from the Legislature with a smaller staff has been tougher than expected, Division of Child and Family Services officials said.

One bill requires the division to seek a judge-signed warrant before removing a child from a home in non-emergency situations. The second requires the division to clean up its database of possible child abusers.

Both are providing more costly and time-consuming than anticipated. "It's adding up to a huge burden on this system," said Adam Trupp, legal administrator for the division.

Since July 1, when the mandates went into effect, the Utah Attorney General's Office has filed for 45 warrants to seize children.

"We're challenged to meet the demand," said Mary Noonan, the chief of the child protection division for the attorney general.

However, as attorneys have become accustomed to seeking warrants, they have cut the average time needed from five hours to about two, Noonan said.

APPENDIX C

Syracuse Post-Standard

Case and social worker not the same
Monday, October 13, 2008

To the Editor:

The circumstances surrounding Erin Maxwell's tragic death has created much controversy and leaves us perplexed. How could this happen again, another child in New York slipped through the system? The public is angry, looking to place blame.

The Sept. 28 editorial, "Protecting Our Children: Social services response to child neglect needs through review" utilizes the designation "social workers" interchangeably with "case workers." I would like to correct the misperception that "social workers" are professionals one and the same as "case workers," which is a generic unregulated term.

While the educational criteria for a case worker vary, and are often quite liberal; those for a social worker are much tighter, following strictly regulated curricula and requiring hundreds of hours of supervised practicum and rigorous academic standards.

Over 20 years ago, when I worked for Department of Social Services, a bachelor's degree was required to be a case worker; while I had earned my bachelors in human services before becoming a case worker, some of my Child Protective Services case worker colleagues held various degrees, including cooking, English, general studies, etc.

The interchangeable use of the term "social worker" with that of other professions often serves to denigrate and deprofessionalize a title of significant meaning; even more so when the profession is inadvertently and implicated in tragedies such as reported in your paper this week. The National Association of Social Workers recognizes that the title "social worker" may only refer to a person holding a bachelors, masters or Ph.D in social work.

Further, as a licensed profession in New York state, the practice of this profession is regulated by the New York State Education Department, limiting the provision of critical services such as mental health diagnosis and psychotherapy to degreed and duly licensed clinical social workers in this state.

It would be to the benefit of your readers and New Yorkers across the state to learn the true meaning of the term "social worker"; an often misunderstood profession.

Mark Buttiglieri is a licensed clinical social worker and Central Division director of the National Association of Social Work's New York chapter.

APPENDIX D

Date: Thursday, November 16, 2006

Source: The Philadelphia Inquirer

Author: Jenna Mehnert

There are many professions that perform critical functions in our society, but they aren't all treated equally. Doctors and nurses receive education specific to their life-saving roles, and then are licensed to practice their profession. The same can't be said of those who protect society's children. Why not? Look at the number of children who were murdered by caregivers or sexually assaulted. Aren't child-protection workers just as critical as doctors and nurses?

Ending violence against children is important not only because hurting the vulnerable is wrong, but also because the damage done comes back tenfold to society. Abuse costs millions of dollars and thousands of unfulfilled lives when damaged children drop out of high school, become teenage parents, enter the juvenile justice system, become addicts, or enter the adult corrections system. Abused children do all these things at statistically higher rates than children who are not abused.

Given how critical protecting children is, one would assume that child-protection workers are educated, trained and licensed to ensure they adequately perform this critical role. Not in Pennsylvania. The Child Protective Services Law does not even require that a child-protection worker have a college degree, let

alone a degree in social work, the professional field developed to educate people to protect children. You would not want a doctor without a medical degree operating on your child, yet Pennsylvania allows individuals without the proper education to protect children.

If they don't have a degree, do they have to at least be well trained? No. In Pennsylvania, a new child-protection worker has up to two years to be trained. You would not want a doctor who had not completed a residency to make your medical decisions alone, yet poorly trained, inexperienced child-protection workers are making life-and-death decisions every day in this state.

Is a state licensing board watching over these workers? No. Child-protection workers are not required to be a member of any licensed profession, so there is no one to ensure that they are doing an adequate, ethical job.

The bottom line is that child protection is not regarded as a profession in Pennsylvania. Individuals who risk their lives and are responsible for the lives of others aren't viewed as professionals, and are not compensated adequately for the incredibly challenging work they do. Philadelphia's Department of Human Services has garnered public attention for its problems lately, but it's not alone in failing to protect children. Across the state, child-protection workers are grossly underpaid, ridiculously overworked through high caseloads, and largely

paraprofessional. Do we really want nonprofessionals removing children from homes and breaking apart families because they lack the professional training to determine when a family can be safety [sic] kept together?

The bottom line is that children and their families will suffer until the state requires that child-welfare workers be professional social workers, sets minimum standards for training, develops a professional pay scale, and limits caseloads.

Jenna Mehnert is executive director of the Pennsylvania chapter on the National Association of Social Workers.